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81-2300

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THALIA KELLY CONSIDINE

and

CHARLES RAY CONSIDINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether the opinion and decision of the Court of Claims herein conflicts with this Court's opinion respecting collateral estoppel in Yates v. United States, 354 U.S. 298 (1957), and the Second Circuit's opinion in The Evergreens v. Nunan, 141 F.2d 927 (2nd Cir. 1944), respecting the proper application of the doctrine of collateral estoppel in a federal tax case.

2. Whether under the doctrine of collateral estoppel a citizen convicted of a crime under Section 7206 (1) of the Internal Revenue Code, a statute which does not involve or require proof of intent to evade tax, is collaterally estopped in a civil action requiring proof of intent to evade tax from denying intent to evade tax.

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26 U.S.C. § 6501(c)(1). . 1,6,8,9,10,11

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28 U.S.C. § 1255(1) 1

MISCELLANEOUS:

10 Mertens, Law of Federal Income Taxation § 57.36 9

Petitioners Thalia Kelly Considine and Charles Ray Considine respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered and filed respectively in this proceeding on March 19, 1982 and March 25, 1982.

OPINION BELOW

The opinion of the Court of Claims (Appendix A) is reported at 645 F.2d 925 (Ct. Cl. 1981).

JURISDICTION

The judgment of the Court of Claims (Appendix B) was dated and entered on March 19, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255 (1).

STATUTORY PROVISIONS INVOLVED

The applicable portions of 26 U.S.C. § 6501 (c) (1), § 6653 (b) and § 7206 (1)

are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner Charles Ray Considine, a resident of California, was indicted under § 7206 (1) of the Internal Revenue Code, the felony perjury statute, for filing false statements on his joint 1966 and 1967 federal income tax returns. Section 7206 (1) provides in relevant part:

> "Any person who--
> (1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * shall be guility of a felony * * *."

The false statements petitioner Charles Ray Considine was charged with making for 1966 were reporting interest income of $23,811 "whereas he then and there well knew and believed, the correct reportable interest income was in the amount of

$33,786," and claiming a charitable contribution to a boy's school in the amount of $20,781.31 "whereas, as he then and there well knew and believed that he was not entitled to said deduction in any amount."* The false statement for 1967 was merely the claiming of a $3,028.21 charitable deduction carryover from 1966 resulting from the foregoing $20,281.31 claimed in 1966.

Prior to the criminal trial, petitioner Charles Ray Considine, as did the defendant in United States v. Anderson, 254 F. Supp. 177, 183-85 (W.D. Ark. 1966), moved for a bill of particulars concerning facts relating to the element of intent to evade tax. As was the defendant in Anderson, 254 F. Supp. at 183-85, petitioner was concerned that "in the event

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* Indictment of May 4, 1972, Count Two.

of an adverse decision or conviction," he would, because of the recent trend of collateral estoppel decisions, "be subjected to the Civil fraud penalties" under § 6653 (b) for intent to evade tax and the opening of the statute of limitations. The Commissioner, as he also did in Anderson, assured the trial court that the criminal perjury case under § 7206 (1) had nothing to do with the element of intent to evade tax, and the district court, as did the trial court in Anderson, sustained the Commissioner's objections, thereby denying petitioner Charles Ray Considine the opportunity to put on evidence denying there was intent to evade tax.

Following conviction of petitioner for 1966 and 1967, the Commissioner asserted § 6653 (b) penalties for intent to evade tax, and, not surprisingly, relied on

collateral estoppel from the criminal perjury convictions to prohibit petitioner Charles Ray Considine from denying that he realized in 1966 an additional $9,975 of interest income and that in 1966 his claimed charitable deduction of $20,781 was limited to $11,904.76.

Since a deficiency in income tax for 1966 results from the addition of $9,975 in "interest" income and reduction of the charitable contribution from $20,781 to $11,904.76 for that year, and a deficiency in income tax for 1967 results from the limitation of the 1966 charitable deduction of $20,781 to $11,904.76 and consequent elimination of the $3,028.21 carryover to 1967, the Commissioner and the Court of Claims have applied collateral estoppel from the criminal perjury case, which the Commissioner and the district courts say does

not involve intent to evade tax in any way, to supply the element of intent to evade tax which is required to apply § 6501 (c)(1)'s provisions opening the statute of limitations and § 6653 (b)'s provisions assessing a 50% civil penalty for intent to evade tax.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With The Collateral Estoppel Decision Of The Supreme Court Of The United States In Yates v. United States, 354 U.S. 298, 338 (1957), And With The Collateral Estoppel Decision Of The Second Circuit In The Evergreens v. Nunan, 141 F.2d 927, 931 (2nd Cir. 1944).

In Yates v. United States, 354 U.S. 298, 338 (1957), this Court, citing approvingly from The Evergreens v. Nunan, 141 F.2d 927, 931 (2nd Cir. 1944), ruled precisely

on the point of whether petitioner Charles Ray Considine is collaterally estopped from denying that in 1966 he realized an additional $9,975 of interest income and overstated a charitable deduction by $8,876.24. It held, 354 U.S. at 338, that the prior § 7206 (1) criminal perjury judgment herein "need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding," and that "so far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative." Stated more specifically in the language from The Evergreens, cited by Yates, Judge Learned Hand held:

> ". . .we do not hesitate to hold that, even assuming arguendo that 'mediate data', decided in the first suit, conclusively established facts 'ultimate' in the second, no fact decided in the first, whether 'ultimate' or a 'mediate datum', conclusively

> establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit." 141 F.2d at 930-931.

That is, the determination of two facts in the earlier criminal perjury suit (petitioner Charles Ray Considine had additional interest income of $9,975 and overstated a charitable contribution by $8,876.24) does not establish anything in this civil proceeding, which involves § 6501 (c) (1)'s opening of the statute of limitations if the return is false or fraudulent with the intent to evade tax, unless those two facts are ultimate facts in this proceeding.

Section 6501 (c) (1)'s provision opening the statute of limitations and validating the assessment herein applies only if the return is false or fraudulent with the intent to evade tax, and it is not sufficient that the return be false if there

exists no intent to evade tax.* It is therefore clear that it is not an ultimate issue of fact in a § 6501 (c) (1) case whether the taxpayer did or did not have additional income or did or did not overstate a charitable deduction. Rather, the ultimate issue of fact in determining the issue here of whether the Commissioner is prohibited by § 6501 (c) (1)'s statute of limitations from assessing the § 6653 (b) penalty is simply whether the 1966 and 1967 returns were false or fraudulent with the intent to evade tax. 10 Mertens, Law of Federal Income Taxation § 57.36. That this is the ultimate issue of fact in a § 6501 (c) (1) case is shown by analogy to the ultimate issue of fact in a § 6653 (b) case, which also requires

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* 10 Mertens, Law of Federal Income Taxation § 57.36.

intent to evade tax in addition to a false or fraudulent return. In Amos v. Commissioner, 43 T.C. 50, 55-56 n.6 (1964), the Tax Court held that the application of § 6653 (b) "depends upon a determination of the ultimate fact that petitioner's underpayment of tax for years 1955 through 1958 was due to fraud," and that "a mediate fact within this context would be a fact merely tending to establish an essential element itself." Hence, as pointed out in Judge Chabot's dissenting opinion in Goodwin v. Commissioner, 73 T.C. 215, 246-247 (1979):

> "The willful filing of an income tax return omitting income is a fact which if true may, together with further facts, be a basis from which an intent to evade tax may be inferred. It is not an 'ultimate' fact in a section 6653 (b) proceeding."

That is, under a statute such as § 6501 (c) (1), which requires that a return be false or fraudulent with the intent to

evade tax in order for the Commissioner to avoid the statute of limitations, the fact of additional income or an overstated deduction is not an ultimate fact. Hence, under Yates and The Evergreens, the Court of Claims was not permitted to hold that petitioner Charles Ray Considine is collaterally estopped in a § 6501 (c) (1) case involving the element of intent to evade tax to deny that he had additional interest income of $9,975 and overstated a charitable deduction by $8,876.24, by such findings in a § 7206 (1) case which does not involve intent to evade tax. Or, to put it another was, the Court of Claims lacks the power to overturn a decision of the Supreme Court of the United States by the simple expedient of labeling as an ultimate fact what is obviously a 'mediate' fact. If it can, there was no point in the Supreme Court spending the time and

energy required to decide Yates.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

Respectfully submitted,

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June 14, 1982

(APPENDIX A, B AND C IN SEPARATE VOLUME)

CERTIFICATE OF SERVICE

I, W. Lee McLane, Jr., attorney for petitioners and a member of the Bar of this Court, certify that this Petition was served upon respondent's counsel of record by depositing three copies in the United States mail on June 14, 1982, first-class postage prepaid, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served were served.

W. Lee McLane, Jr.

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APPENDIX A, B AND C TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 271-79T

(Decided March 25, 1981)

THALIA KELLY CONSIDINE AND

CHARLES RAY CONSIDINE

v. THE UNITED STATES

Nola McLane, for plaintiff; William Lee McLane, attorney of record. McLane & McLane, of counsel.

Donald P. Lan, Jr., with whom was Assistant Attorney General M. Carr Ferguson, for defendant. Theodore D. Peyser and Robert S. Wilkins, of counsel.

Before Davis, Judge, Skelton, Senior Judge, and Smith, Judge.

ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S

CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, Judge, delivered the opinion of the court:

Charles Ray Considine and Thalia Kelly Considine seek a refund of ordinary income taxes and of tax fraud penalties they paid to the Internal Revenue Service for 1966 and 1967. The major problem is whether this civil refund proceeding is controlled at all by Charles Considine's previous federal conviction for filing false returns for those years. There is also an ancillary question on plaintiffs' liability for income taxes on a deduction item as to which Mr. Considine was not found guilty.

The bare uncontroverted facts in these cross-motions for summary judgment are these:[1] The plaintiffs are residents of

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[1](All footnotes follow Opinion)

California. They filed joint federal income tax returns for the years 1965, 1966, 1967 and 1969, which the Commissioner of Internal Revenue determined had understated income and overstated deductions. In May 1972, Charles Considine (Considine) was indicted by a federal grand jury for willfully and knowingly making and subscribing those returns in violation of Internal Revenue Code § 7206 (1).[2] On March 2, 1973, he was convicted on all counts of the indictment. The conviction was affirmed on appeal and the Supreme Court denied Considine's petition for certiorari.[3] Thereafter the Service issued statutory notices of deficiency asserting the 50% fraud penalty under I.R.C. § 6653 (b) (1954).[4] Taxpayers paid the penalties for 1965, 1966, and 1967, and made timely applications for refunds. The Commissioner did not grant the

requests and the plaintiffs brought this suit for the 1966 and 1967 penalties ($12,403 for 1966 and $2,851 for 1967).[5]

The dispute over the taxes and penalties owed for 1966 and 1967 involves unreported interest income of $9,975 for 1966, and a charitable contribution deduction of $20,781 to Tabor Academy taken in part in 1966, with a $3,028.21 carryover to 1967. The District Court for the Southern District Court of California found in the criminal case[6] that Considine had reported$23,811, "whereas as he then and there well knew, he was required to report interest in the total amount of $33,786." Conclusion of Law No. 9. The difference is $9,975. As for the charitable donation, the District Court found that, "as he then and there well knew," Considine "was entitled to, at most, such a contribution claim of only $11,904.76. * * *"

Conclusion of Law No. 10.[7] The court made comparable findings of fact.

I

Inquiry into the bearing of the criminal conviction on the present civil proceeding is molded by the conceded and significant difference between the criminal statute under which Considine was convicted and the civil provision for a fraud penalty. The former (§ 7206 (1), supra) requires a knowing false statement in the return but it does not call for proof of an underpayment of the tax or of an intent to evade. See, e.g., United States v. Anderson, 254 F.Supp. 177, 183-85 (W.D.Ark. 1966). The civil penalty statute (§ 6653 (b), supra), on the other hand, adds these elements of intent to evade the tax[8] and of an underpayment. In the context of this difference taxpayers say that nothing in the criminal

conviction is binding in the present proceeding, under either the principle of res judicata (claim preclusion) or that of collateral estoppel (issue preclusion). The Government first seemed to urge that the criminal judgment, without more, wholly determined the entire substance of this civil suit (except perhaps for the underpayment), but in the end it has limited its defense to the application of issue preclusion (collateral estoppel) only to those specific issues actually tried and determined in the criminal case (not including intent to evade or existence of an underpayment). We confine our consideration to that narrower contention and agree with defendant on the point.

A. Apart from taxpayer's argument that issue preclusion or collateral estoppel can be applied only to "ultimate" issues which are the same as those in the current

proceeding (a point we discuss in Part I, B, infra), there is no doubt that the proper elements for preclusion are present on the issues of whether the tax returns for 1966 and 1967 contained knowing falsifications of the amount of interest income received and the amount of charitable deductions claimed. There is issue preclusion, "whether on the same or a different claim," "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." RESTATEMENT (SECOND) OF JUDGMENTS, § 68 (Tent. Draft No. 1 1973); see also Commissioner v. Sunnen, 333 U.S. 591, 598 (1948).[9] In this instance, there is no need to discuss a third-party's right to invoke issue preclusion because the United States and Considine are the same parties in both actions. See Sunshine

Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-03 (1940).[10] The Ninth Circuit having affirmed and certiorari having been denied, the judgment in the criminal case is indisputably final, and there is no dispute as to its validity. There is no doubt,either, that issue preclusion can apply even though the former adjudication against the claimant was criminal and the later proceeding is civil. E.g. Local 167, Int'l Brotherhood of Teamsters v. United States, 291 U.S. 293,298 (1934); Armstrong v. United States, 173 Ct. Cl. 944, 968-972, 354 F.2d 274, 289-91 (1966); RESTATEMENT (SECOND) OF JUDGMENTS, § 133, (Tent. Draft No. 7) (1980).

Two issues directly bearing on the fraud penalties were actually litigated and determined in the criminal case: first, the falsity of the returns' omission of some interest income and of the

overstatement of a charitable deduction in the amount stated, and, second, Considine's knowledge of those falsities. See the District Court's conclusions of law Nos. 9 and 10, quoted supra, and its parallel factual findings. These determinations were essential to Considine's conviction under counts two and three of the indictment, covering 1966 and 1967,[11] as well as under the statute; Section 7206 (1), supra, plainly punishes a false statement in a return if the taxpayer does not believe it to be true. These same issues have a direct impact on a finding of "fraud" under the fraud penalty provision—the findings of these knowing falsities plus proof of an intent to evade tax constitutes fraud. See note 8, supra. (Proof of an underpayment is also necessary for the fraud penality).

The sum of it is that, as to these

issues of knowingly false overstatement in the returns of income and of a charitable deduction, there would plainly appear to be issue preclusion in the present case.

B. Taxpayers deny this result because, they say, such collateral estoppel can be allowed only if "ultimate" facts are shown in the first case, and that is not so here because the "ultimate" fact for the fraud penalty is that the "underpayment * * * of tax * * * is due to fraud" —an issue not presented or determined in the criminal case. The first answer is that, even if we accept this sharp distinction between "ultimate" and "mediate" or "evidentiary" facts in the earlier criminal case. They were squarely within the terms of § 7206 (1), supra, essential to conviction, vigorously tried, and actually determined by the court.

In this fraud penalty action, we think that these questions are likewise "ultimate" facts. As the fraud penalty provision, § 6653 (b), has been construed (see note 8, supra), the "ultimate" facts for the statute in this case include (a) a knowing falsification in the return, (b) an intent to evade, and (c) an underpayment. The single term "fraud" in § 6653 (b) thus consists of two separate parts—an intentional wrongdoing (including a knowing falsification) and an intent to evade (see note 8, supra), both of which may properly be called "ultimate" facts as to the fraud penalty. Where, as here, the issue of knowing falsification was throughly presented in the earlier case and actually determined and where, also as in this case, it is wholly foreseeable that a civil fraud penalty may be imposed after conviction, it is just and proper to treat the issue of knowing falsification

as an "ultimate" fact in the subsequent fraud penalty proceeding.[13] Not only is this interpretation correct under the words of § 6653 (b); it also harmonizes fully with the general policies of the doctrine of collateral estoppel (or issue preclusion) to avoid time-consuming, repetitious, and unnecessary litigation, to obtain consistency of result in successive cases, and to end controversies over particular issues. See, e.g., Armstrong v. United States, supra, 173 Ct. Cl. at 971-72, 354 F.2d at 290-91.

It is very doubtful, moreover, that a rigid separation of "ultimate" facts from "mediate" data or "evidentiary" facts is now tenable in the field of collateral estoppel or issue preclusion. The American Law Institute has said:

> "* * * Such a formulation is occasionally used to support a refusal to apply the rule of issue

preclusion when the refusal could more appropriately be based on the lack of similarity between the issues in the two proceedings. If applied more broadly, the formulation causes great difficulty, and is at odds with the rationale on which the rule of issue preclusion is based. The line between ultimate and evidentiary facts is often impossible to draw. Moreover, even if a fact is categorized as evidentiary, great effort may have been expended by both parties in seeking to persuade the adjudicator of its existence or nonexistence and it may well have been regarded as the key issue in the dispute. In these circumstances the determination of the issue should be conclusive whether or not other links in the chain had to be forged before the question of liability could be determined in the first or second action.

"The appropriate question, then is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception under § 68.1-- for example, that the subsequent action was not sufficiently foreseeable at the time of the first action."

RESTATEMENT (SECOND) OF JUDGMENTS, § 68, comment j (Tent. Draft No. 1, 1973); see

also § 68.1 (e) (ii); § 68.1 comment i and Reporter's Note to § 68, comment j at 167-69.[14] Under the Law Institute's formulation, there is plainly a bar to relitigation of the important issues actually raised and determined in the criminal case.

Collateral estoppel, then, bars plaintiff from now contesting the fact that Considine knowingly falsified the amount of the charitable deductions.[15]

II

Defendant does not now urge that the criminal conviction determines all aspects of this case— only the knowing falsification of income and of a charitable deduction (Part I, supra). There remain, therefore, the questions whether there were (a) underpayments of tax and (b) an intent to evade.[16] The first is quickly decided. The parties have stipulated that

the plaintiffs had no additional deductions or credits, and that none of the items of income reflected on the returns are excludable. In addition, the stipulation affirms that, if (as we have just held) collateral estoppel applies to the knowing understatement of income and overstatement of deductions, there would be underpayments within § 6653 (c) (1).[17]

The less simple question concerns the intent to evade tax. It is settled that, in this civil penalty suit, the Government has the burden of proving the plaintiff's fraud— which includes the intent to evade (see Part I, supra)— with clear and convincing evidence. See, e.g. Irolla, supra, 182 Ct. Cl. at 779, 390 F.2d at 953; Powell v. Granquist, 252 F.2d 56, 61 (9th Cir. 1958); I.R.C. § 7454 (a). This burden may be met, however, through circumstantial evidence. Irolla, supra,

182 Ct. Cl. at 779, 390 F.2d at 953-54; Plunkett v. Commissioner, 465 F.2d 299, 303 (7th Cir. 1972); Powell, supra, 252 F.2d at 61.

On the basis of the stipulated and undisputed facts plus the prior judicial determination that taxpayers knowingly falsified their returns so as to understate income and overstate deductions,[18] we find the necessary intent to evade tax. The stipulation in this case shows that Charles Considine was a very knowledgeable man. He received a Bachelor of Science degree in 1942 from the University of California at Berkeley, and later earned a Masters Degree in business economics. Since 1946, he has practiced as a certified public assountant in California. The defendant has also asserted (Defendant's Reply Brief, at 8), and the plaintiffs have not denied, that in addition,

Considine has studied law, taught accounting and taxation, and conducted real estate seminars. His affidavit submitted in support of the plaintiffs' motion for summary judgment, containing citations to case law and to tax treaties, also suggests a high degree of sophistication in matters concerning real estate transactions and taxation. Combining this proof of Considine's expertise with the established facts that he knowingly understated his income and overstated his deductions leading to an underpayment,[19] we cannot avoid concluding that at the times he filed the returns he intended to evade. There is no alternative explation nor is one proffered.[20] Considine's affidavit in this court protests merely that his deductions and omissions of income were legitimate. This is precisely the sort of argument that is precluded

here because the District Court in the criminal case has already decided that Considine's tax returns were not merely wrong but also that he filed them believing them to be false.

Having thus found that Considine filed his returns falsely and fraudulently with an intent to evade tax, we must also hold the statute of limitations tolled on the collection of the entire tax including the penalty. I.R.C. §§ 6501 (c) (1), Lowy v. Commissioner, 288 F.2d 517, (2nd Cir. 1961), cert. denied, 368 U.S. 984 (1962); Camien v. Commissioner, 420 F.2d 283, 287-88 (8th Cir. 1970); Friedman v. Commissioner, 27 T.C.M. 714, 723-24, aff'd per curiam, 421 F.2d 658 (6th Cir. 1970).[21] See also note 26, infra.

It follows that plaintiffs cannot recover the relevant tax or fraud penalty (aside from corrections in the penalty[22]

and changes due to the remand directed in Part III, infra).

III

Our holding (Part II, supra) that the plaintiffs are liable for the § 6653 (b) fraud penalty disposes of all aspects of this case except for a charitable contribution to Tabor Academy. This $11,904 + is the amount that the Government failed to prove (beyond a reasonable doubt) was falsely claimed. United States v. Considine, supra, 34 AFTR2d at 74-5414-15, 74-2 USTC at 85,076, Conclusions of Law Nos. 7 & 10; Stipulation par. 18. See note 7 and text, supra. Collateral estoppel does not bar litigation over this amount. We are asked to determine whether a suit for a refund based on this money is properly before us, or whether it can or should be brought only after February 18, 1981, six months

beyond the plaintiffs' third claim for a refund was assertedly filed.[23]

Plaintiffs have filed three sets of claims for refund. The first was limited to all of the fraud penalties they had paid for 1966 and 1967. The second covered the deficiency in tax owed for 1966 and 1967. The third claim, said to have been filed on August 18, 1980, incorporates the first two and also lists the separate items on which the claim is based. The plaintiffs say that, although they consider the first two claims to have been sufficiently specific, the third amends them in the event they were not. The defendant urges that the third claim does not amend the others, but is a new claim. As a separate new claim, it is untimely as to the penalties, and since six months had not passed (by the argument date) from its date of filling, it is too early for

a suit on the tax itself. As for the first two sets of refund claims, defendant contends that a suit based on the $11,904 is at variance with those claims in that they did not specifically refer to this aspect, and as a result the plaintiffs are not entitled (under those refund claims) to a reduction of the fraud penalty or a refund of ordinary taxes based on the $11,904 deduction. In the first claim, the plaintiffs said (for 1966):[24]

> The applicable statute of limitations bars collection of the $12,403 Section 6653 (b) penalty for the year 1966. There was no false or fraudulent return for 1966 with the intent to evade tax, and therefore no penalty is properly assessable. The statute of limitations is not opened under Section 6501 (c) (1). [emphasis added]

They said further that even if they were wrong in their denial of fraud ("assuming arguendo that the Commissioner

* * * could prove * * *"), the penalty was incorrectly computed.[25]

The plaintiffs' second claim says (for 1966):

> The applicable statute of limitations bars collection of the $20,663 deficiency for the year 1966. There was no false or fraudulent return for 1966 with the intent to evade tax. The statute of limitations is not open under Section 6501 (c) (1). [emphasis added]

(The second claim for 1967 was similar but differed as to the figures.)[26]

We recognize the importance of the requirement that claims be specific so that they prevent surprise, give adequate notice to the Internal Revenue Service, and grant the Service a chance to correct errors and limit litagation. Cook v. United States, 220 Ct. Cl. ___, ___, 599 F.2d 400, 406 (1979); Union Pacific R.R. v. United States, 182 Ct. Cl. 103, 109, 389 F.2d 437, 442 (1968). But though the plaintiffs' first two sets of claims do

not break down their general denials of falsity and fraud item by item, they seem clearly to encompass and deny all of those elements of falsity and fraud that the Commissioner charged them with—including the deduction of the gift to Tabor Academy. Until this court's ruling today that the plaintiffs are liable under § 6653 (b) for all but $11,904.76 of their claims, they had no reason to isolate this amount from the rest. It was nevertheless, in our view, included in the denials of any fraud of falsity in both the first and the second sets of claims, and the Commissioner was adequately alerted to the challenge to the entire amount, including this $11,904 portion. See, e.g. Harlan v. United States, 160 Ct. Cl. 209, 218, 312 F.2d 402, 408 (1963). As we have pointed out, in Considine's criminal case the Government

failed to prove beyond a reasonable doubt that the $11,904.76 had been deducted with knowledge of its falsity. That the District Court singled out this amount provided additional and explicit notice that it would remain in contention. The first two sets of refund claims (as well as the third) were filed after the criminal conviction and obviously in its light (including its finding that the Government's proof failed as to $11,904.76). Thus, the Service should have known that the plaintiffs were seeking refund of the $11,904.76 item both as to income tax and as to the fraud penalty.

The refund claim as to the $11,904.76 is therefore properly in this court with respect both to the fraud penalty based on that item and also as to taxpayers' income tax liability for it. The Trial Division will have to determine whether

or not taxpayers were entitled to that deduction and whether or not a fraud penalty could be based on it. We do not, of course, decide or have any view on the issues of whether fraud under § 6653 (b) should be found in this civil suit with respect to the $11,904.76 or whether taxpayers were entitled to that deduction.

IV

Partial summary judgment is granted to the defendant, subject to further modification at trial under this opinion. We send this case to the Trial Division for a determination of the amount of the refund owing to the plaintiffs. In that connection, the trial judge should adjudicate the legality of the claimed $11,904.76 charitable contribution deduction still in dispute. Depending on the outcome, the plaintiffs could be entitled to a reduction in the fraud

penalty they paid and to a refund of ordinary taxes paid after disallowance of that deduction. Whatever the outcome on those issues, the plaintiffs are entitled to a refund based on the stipulated corrections to the penalties they owed. The parties' motions for summary judgment are granted and denied in accordance with this opinion and the foregoing disposition.

FOOTNOTES

1 Plaintiffs' motion is partial and goes only to the Government's defense of collateral estoppel on the basis of the criminal conviction. Plaintiffs urge that there should be a trial on all the substantive issues. However, the parties entered into a stipulation of further facts on which the Government relies and which we consider later in the opinion.

2 26 U.S.C. 7206 (1) provides in relevant part:

Fraud and false statements.

Any person who--

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made

under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * * shall be guilty of a felony * * *.

3 United States v. Considine, 34 AFTR2d 74-5412, 74-2 USTC 85,073 (S.D. Call.), aff'd 502 F.2d 246 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974).

4 Sec. 6653. Failure to pay tax.

(b) Fraud.--If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

5 There is a dispute whether the suit as originally filed demanded or could demand return of income taxes themselves. See Part III, infra

For 1965, suit was brought and partial summary judgment was granted for the defendant in the District Court for the Southern District of California, Civil No. 79-076-GT, (unpublished order of March 18, 1980). For the 1969 year, action was brought in the Tax Court and taxpayers' claim rejected if the Commissioner proved an underpayment. Considine v. Commissioner, 68 T.C. 52 (1977).

6 The criminal trial was by the bench without a jury.

7 This conclusion amounted to a determination that the Government had not

prevailed in the criminal case as to $11,904.76 of the charitable deduction to Tabor Academy. See Part III, infra.

8 The "fraud" element in section 6653 (b), has been held to incorporate the concept that the taxpayer had an intent to evade tax. See e.g. Irolla v. United States, 182 Ct. Cl. 775, 778, 390 F.2d 951, 953 (1968) ("fraud" is "intentional wrongdoing on the part of a taxpayer motivated by a specific purpose to evade a tax known or believed to be owing"); Considine v. Commissioner, supra, 68 T.C. at 61 n.8 (1977) (although § 6653 (b) does not contain the words "with intent to evade tax," the term "fraud" embodies that element). Knowing falsification of a material item in the return is obviously an intentional wrongdoing (as used in Irolla) which can be related to the intent to evade (if that is proved).

9 Exceptions now irrelevant are emunerated in § 68.1 of the RESTATEMENT (SECOND) OF JUDGMENTS, and, in part, in Commissioner v. Sunnen, supra, 333 U.S. at 599-601.

10 On Mrs. Considine's position, see note 15, infra.

11 Count Two charged that, for 1966, Considine reported (a) interest income of $23,811.00 although he knew and believed the correct reportable interest income was $33,786.00, and (b) a contribution deduction to Tabor Academy of $20,781.31 although he knew and believed that he was not entitled to that deduction in any amount. (The District Court did

not find a knowing falsification as to the full amount of the contribution deduction to Tabor Academy.)

Count Three charged that, for 1967, Considine reported a contribution deduction to Tabor Academy of $3,028.21 although he knew and believed that he was not entitled to that deduction in any amount.

12 In The Evergreens v. Nunan, 141 F.2d 927,928 (2nd Cir.), cert. denied, 323 U.S. 720 (1944), Learned Hand defined an "ultimate" fact as "one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question" and a "mediate datum" as "a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right."

13 The plaintiffs have not asserted that the issues the Government seeks to preclude were either unimportant in or unnecessary to the former judgment nor that it was unforeseeable that these issues could resurface in the context of fraud penalty proceedings. The serious consequences of a § 7206 (1) conviction insured the significance of these issues, which were at the heart of the indictment against Considine. Moreover, in unsuccessfully petitioning the District Court (in the criminal case) to permit evidence of plaintiff's lack of intent to evade taxes, Considine showed his awareness not only of the potential civil litigation to follow but also of the potential consequences of collateral estoppel.

14 This Reporter's Note points out (Tent. Draft No. 1, at 168) that the real dangers in attaching preclusive effect to subsidiary findings are (1) that such effect will be given to determinations of issues that were not seriously contested and may have been barely relevant and (2) that determinations may have wholly unforeseeable consequences. Neither of these dangers exists in the present case. See note 13, and text supra.

In Yates v. United States, 354 U.S. 298, 338 (1957), while the Supreme Court said that collateral estoppel is inoperative for merely evidentiary or "mediate" facts, its actual holding was that the matters of fact and mixed fact and law necessarily determined by the prior judgment were so remote from the issues in the second case that the trial judge could exclude them from evidence. That is, of course, not true here.

15 Taxpayers have not argued to us that, if Mr. Considine is estopped, Mrs. Considine should be treated differently. Cf. Considine v. Commissioner, supra, 68 T.C. at 67-68, saying that the spouse of a convicted taxpayer filing a joint return need not necessarily be estopped.

16 All that United States v. Anderson, 254 F.Supp. 177, 183-85 (W.D.Ark. 1966), held was that a conviction under § 7206 (1) does not involve or determine the issue of intent to evade the tax. We have no reason to disagree with that view.

17 The parties also agreed that the amounts assessed, as corrected by the Commissioner (see note 22, infra), are

accurate except for the $11,904.76 (not barred by estoppel) which is still in dispute (Part III, infra). We need not reach the question of whether collateral estoppel would extend to the precise amounts of money involved. Compare Considine v. Commissioner, supra, 68 T.C. at 62-65 and United States v. Colacurcio, 514 F.2d 1, 6 (9th Cir. 1975) (finding no collateral estoppel as to the amount), with Considine v. United States, supra, Civ. No. 79-076-GT, (S.D.Cal. 1980) (finding estoppel as to the amount, without discussion).

18 In Part I, supra, we have held that those determinations can and should be accepted in this suit.

19 It is proper to combine proof made in this case with facts established by collateral estoppel. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568-71 (1951); Adams v. United States, 175 Ct. Cl. 288, 300-01, 358 F.2d 986, 993-94 (1966).

20 This is plainly not a case like that mentioned in Judge Featherston's dissent in Goodwin v. Commissioner, 73 T.C. 215, 235 (1979) — a taxpayer's willfully falsifying his return in order to cover up the source of an illegal kickback but likewise omitting a legitimate deduction so as not to underpay or evade his tax.

21 I.R.C. § 6501. Limitations on assessment and collection

(c) Exceptions.--

(1) False return.-- In the case of a false or fraudulent return with the

intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

22 The parties have stipulated that, if the fraud penalty was properly assessed, the Commissioner erred in his calculation of the amount owed. In fact, the fraud penalty for 1966 should have been $7,697 and for 1967 should have been $487. Stipulation par. 18.

23 I.R.C. § 6532 (a). The defendant says that it has been unable to verify the filing of the third claim. Under our disposition of the matter, we need not resolve this problem.

24 The claim for 1967 was similar but differed in its figures.

25 The defendant concedes that the computation was incorrect. See note 22, supra.

26 Although the second set of claims, and plaintiffs' First Amended Petition, filed September 17, 1980, seek refunds of the entire deficiency in ordinary income, the parties' briefs address only the contested $11,904.76 deduction. We note, nevertheless, that because of our finding that the plaintiffs filed false and fraudulent income tax returns for 1966 and 1967 with an intent to evade tax, the statute of limitations as to the deficiency in ordinary tax—apart from the contested $11,904.76—is tolled and the plaintiffs' request for a total refund based on the statute of limitations must be denied.

APPENDIX B

United States Court of Claims

THALIA KELLY CONSIDINE

and

CHARLES RAY CONSIDINE No. 271-79T

vs.

THE UNITED STATES

At a Court of Claims held in the City of Washington, on the 19th day of March, A.D. 1982, judgment was ordered to be entered as follows:

This case comes before the court on stipulation of the parties filed March 15, 1982, signed on behalf of the plaintiffs and the defendant by the respective attorneys of record.

On March 16, 1982, the trial judge of this court filed a memorandum report recommending that, in accordance with

the stipulation filed March 15, 1982, judgment should be entered in favor of plaintiffs for $20,007.74, plus interest according to law.

IT IS THEREFORE ORDERED that judgment be and the same is entered for plaintiffs in the amount of $20,007.74, plus interest according to law.

A true copy of record.

In testimony whereof I have hereto set my hand and affixed the seal of said Court at Washington, this 19th day of March, A.D. 1982

Frank T. Peartree
Clerk, Court of Claims.

Attest: Daniel M. Friedman
Chief Judge.

APPENDIX C

The following provisions of the Internal Revenue Code of 1954 (26 U.S.C.) are involved:

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(c) EXCEPTIONS.—

(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

SEC. 6653. FAILURE TO PAY TAX.

(b) FRAUD.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who--

(1) DECLARATION UNDER PENALTIES OF PERJURY.—Willfully makes and subscribes any return, statement, or other document, which contains or is

verfied by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * shall be guilty of a felony * * *.

Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2300

In the Supreme Court of the United States

OCTOBER TERM, 1982

THALIA KELLY CONSIDINE AND CHARLES RAY CONSIDINE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2300

THALIA KELLY CONSIDINE AND CHARLES RAY CONSIDINE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented in this federal income tax refund suit is whether petitioners were estopped from denying that petitioner Charles Ray Considine willfully filed false and fraudulent income tax returns for tax years 1966 and 1967.[1]

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[1]Petitioners have reproduced the Court of Claims' opinion as Appendix A to their petition. However, at page 10 of Appendix A, following the phrase "or 'evidentiary' facts," the following words were omitted:

> as important for collateral estoppel, we cannot agree with taxpayers' delineation of the "ultimate" facts shown in the earlier proceeding or to be shown in the present case.[12] Certainly, the knowing misstatement of income and of charitable deductions were "ultimate" facts.

The opinion of the Court of Claims is reported at 645 F. 2d 925 and the passage in question can be found at page 929 of that report.

1a. The relevant facts may be summarized as follows: Petitioners filed joint returns for the years 1965, 1966, 1967 and 1969. In May 1972, petitioner Charles Considine (hereinafter Considine) was indicted by a federal grand jury for willfully and knowingly making and subscribing false federal income tax returns for these years, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.) (Pet. App. 3). On March 22, 1973, after a non-jury trial, Considine was convicted on all four counts of the indictment. In the criminal case the district court found that Considine had knowingly understated his interest income in 1966 by $9,975. In addition, the district court found that Considine had claimed a charitable contribution of $20,781.31 on the 1966 tax return, "whereas, as he then and there well knew, he was entitled to, at most * * * only $11,904.76, thereby overstating his contribution claim by $8,876.55," and that, in 1967, he had claimed a contribution carry-over of $3,028.21, "whereas, as he then and there well knew, he was not entitled to claim any portion thereof." *United States* v. *Considine*, 34 A.F.T.R. 2d para. 74-5116, at 74-5414 to 74-5415 (S.D. Cal. Mar. 22, 1973). The Ninth Circuit affirmed, and this Court denied certiorari on April 29, 1974. *United States* v. *Considine*, 502 F. 2d 246 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974).

The Commissioner of Internal Revenue subsequently issued statutory notices of deficiency for 1965-1967 and 1969, in which he asserted fraud penalties pursuant to Section 6653(b) of the Internal Revenue Code of 1954 (26 U.S.C.). For the years 1965, 1966 and 1967, petitioners paid the deficiencies and filed claims for refunds. The claims were denied and petitioners brought this suit for the years 1966 and 1967 in the Court of Claims (Pet. App. 3-4, 27).[2] In

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[2]Petitioners have contested the Commissioner's assertion of the civil fraud penalty for each of the four years, resorting to three different forums. This suit in the Court of Claims was for the years 1966 and

that court the parties stipulated that petitioners "had no additional deductions or credits, and that none of the items of income reflected on the returns are excludable." In addition, it was stipulated that if "collateral estoppel applies to the knowing understatement of income and overstatement of deductions, there would be underpayments within § 6653(c)(1)" (Pet. App. 14-15).

On cross-motions for summary judgment the Court of Claims held that Considine's conviction for filing false income tax returns for 1966 and 1967 barred petitioners from denying that Considine had knowingly falsified the amount of interest income and charitable deductions on such returns (Pet. App. 9-10). Because petitioners conceded that they had no deductions or exclusions that had been omitted from their returns, the court held that they were also estopped to deny that they had underpaid their taxes (*id.* at 14-15). Finally, considering the stipulated and undisputed facts showing that Considine possessed a high degree of sophistication in matters concerning taxation, the prior adjudication that he had knowingly understated his income and overstated his charitable deductions and the absence of any innocent explanation for his returns that did not entail relitigation of the prior determinations, the Court of Claims determined that the false returns had been filed with the

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1967. For the years 1965 and 1969, petitioners filed suit in the Southern District of California and in the Tax Court, respectively. In both of the latter proceedings the courts have held that Considine was estopped from relitigating issues determined in the criminal case: that he filed false and fraudulent income tax returns and willfully omitted interest income in 1965 (*Considine* v. *United States*, Civ. No. 79-076-GT (S.D. Cal. Mar. 18, 1980), appeal pending, No. 80-5676 (9th Cir.)) and that he filed false and fraudulent income tax returns and omitted capital gains income in 1969 (*Considine* v. *Commissioner*, 68 T.C. 52 (1977)).

intent to evade (Pet. App. 16-18). Accordingly, the court sustained the deficiencies determined for fraud penalties.[3]

2. The decision below is correct, and there is no conflict of authority or other circumstance warranting review by this Court.

Section 6653(b) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that "[i]f any part of any underpayment * * * of tax * * * is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment." The specific intent required for imposition of the civil fraud penalty is interwoven within the definition of "willfully" contained in Sections 7201 and 7206(1) of the Code; and a criminal conviction under either section conclusively establishes for civil purposes that a fraudulent return was filed.[4] *Amos* v. *Commissioner*, 43 T.C. 50 (1964), aff'd, 360 F. 2d 358 (4th Cir. 1965); *Armstrong* v. *United States*, 354 F. 2d 274 (Ct. Cl. 1965); *Considine* v. *Commissioner*, 68 T.C. 52, 60 (1977); *Goodwin* v. *Commissioner*, 73 T.C. 215 (1979).

Because there is no suggestion that the issues were less than fully and fairly litigated in the criminal case, the Court of Claims correctly held that the district court's determination that Considine had knowingly omitted interest income and overstated charitable deductions—determinations that

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[3]Because the government had failed in the criminal case to prove beyond a reasonable doubt that the entire amount of the charitable contribution deduction taken by petitioners in 1966 had been falsely claimed as a charitable deduction (see page 2, *supra*) the Court of Claims remanded the case for the purpose of determining the precise extent of petitioners' liability for income taxes and fraud penalties (Pet. App. 19, 23-25). This issue was subsequently settled and judgment was entered (*id.* at 33-34).

[4]The meaning of the term "willfully" as employed in Section 7201 and 7206(1) is the same. The statutory term has been defined by this Court as "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976).

were essential to his conviction under Section 7206(1)—estopped petitioners from denying that their 1966 and 1967 returns were false and fraudulent and that they had omitted interest income from their 1966 return and overstated charitable deductions on their 1966 and 1967 returns. *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979). At least where, as here, petitioners stipulated that there were underpayments in tax resulting from the fraudulent entries on their returns and there was no suggestion of an innocent explanation, all the elements needed to sustain imposition of a fraud penalty under Section 6653(b) have been established, and the asserted penalty was correctly upheld.

3. Petitioners contend (Pet. 6-11), however, that collateral estoppel was improperly applied in this case, asserting that the doctrine has no application to a prior determination of "mediate" facts, but is limited instead to prior determinations of "ultimate" facts. As noted by the Court of Claims, however, even if petitioners' distinction between "ultimate" and "mediate" facts is accepted, "the knowing misstatement of income and of charitable deductions were 'ultimate' facts in the earlier criminal case" (645 F. 2d at 929; see page 1 note 1, *supra*).

Thus, petitioners' contention (Pet. 6-12) that the holding of the Court of Claims here conflicts with this Court's decision in *Yates* v. *United States*, 354 U.S. 298 (1957), and the Second Circuit's decision in *The Evergreens* v. *Nunan*, 141 F. 2d 927, cert. denied, 323 U.S. 720 (1944), is without merit. The Court of Claims properly took account of those decisions and recognized the absence of any conflict (see Pet. App. 10-12, 29 n.12, 30 n.14; see also page 1, note 1, *supra*). Both *Yates* (354 U.S. at 336) and *The Evergreens* (141 F. 2d at 928) hold that the doctrine of collateral estoppel makes conclusive in subsequent proceedings determinations of fact and mixed fact and law questions that were essential to the prior decision. Here, the district court

in the criminal case had found that Considine had knowingly falsified the amount of his interest income and the amount of the charitable deductions. These facts were essential to Considine's convictions under Section 7206(1) for willfully making returns "which he [did] not believe to be true and correct as to every material matter." They were accordingly properly regarded as "ultimate" facts, already determined, that petitioners were barred from relitigating here.

Petitioner appears to suggest (Pet. 9-10) that collateral estoppel can have no application because the facts necessarily determined in the criminal case, taken by themselves, did not, in the Court of Claims' view, establish all of the elements requisite for imposition of a civil fraud penalty. Acceptance of this contention would abolish the fundamental distinction between collateral estoppel (issue preclusion) and res judicata (claim preclusion). See *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982), slip op. 5 n.6, 20 n.22.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1982

DOJ-1982-08

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ALEXANDER L. STEVAS,

No. 81-2300

In the Supreme Court of the United States

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PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is filed to draw to the Court's attention the decision of the United States Court of Appeals for the Ninth Circuit in *Considine* v. *United States*, No. 80-5676 (Aug. 13, 1982). In that case, as is explained in our Memorandum in Opposition to the petition herein (Mem. in Opp. 2 n.2), the taxpayers contested the Commissioner's assessment of civil fraud penalties for the year 1965; the present case represents petitioners' challenge to the penalties imposed for 1966 and 1967. The primary issue, whether Charles Ray Considine's conviction for willfully making false income tax returns in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.) collaterally estopped him from denying in a civil fraud penalty action that he had knowingly falsified the amount of taxable income reported on his returns, was the same in each case. The Ninth Circuit reached the same

affirmative conclusion as the Court of Claims, expressly approving the Court of Claims' decision that petitioners tender for review (App., *infra*, 4a-5a).[1] A copy of the Ninth Circuit's decision, which we received after filing our Memorandum in Opposition, is reproduced in the appendix to this Memorandum for the information of the Court.

The petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

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[1]While approving the rationale and result of the Court of Claims' decision, which was denominated "*Considine II*," the Ninth Circuit rejected (App., *infra*, 3a-4a) what it took to be the broader rationale of the Tax Court in *Considine* v. *Commissioner*, 68 T.C. 52 (1977) (denominated "*Considine I*"; see Mem. In Opp. 2 n.2) that a conviction for filing a false return, without more, establishes all of the elements of fraud justifying a civil penalty. The Court of Claims had explicitly recognized (Pet. App. 6) that it was unnecessary for it to consider the broader theory. The decisions of the Ninth Circuit and of the Court of Claims are accordingly in harmony in all relevant respects.

DOJ-1982-09

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 13 1982

PHILLIP B. WINBERRY
CLERK US COURT OF APPEALS

THALIA KELLY CONSIDINE, and CHARLES RAY CONSIDINE,	)
Plaintiffs-Appellants,	)
vs.	) No. 80-5676
UNITED STATES OF AMERICA,	) D. Ct. No. 79-0766-GT
Defendant-Appellee.	) OPINION

Appeal from the United States District Court for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

Argued and Submitted: May 6, 1982
Decided: , 1982

Before: CHAMBERS, Senior Circuit Judge, and ANDERSON and SKOPIL, Circuit Judges

ANDERSON, Circuit Judge:

Considine appeals from summary judgment entered in favor of the Government in his tax return suit. He contends that the district court erred in holding that his prior

conviction for filing a false return collaterally estopped him from contesting liability for a civil fraud penalty. We affirm, although for reasons different from those relied on by the district court.

FACTS

Charles and Thalia Considine filed a joint tax return for 1965 showing $8,701 interest income. In 1972, Charles Considine was convicted of willfully filing false tax returns for 1965-67 and 1969, in violation of I.R.C. § 7206(1). The indictment charged and the trial court found that Considine had omitted $57,131 interest income in 1965. This court affirmed. *United States* v. *Considine*, 502 F. 2d 246 (9th Cir. 1973), *cert denied*, 416 U.S. 970 (1974). The Commissioner later issued notices of deficiency for 1965, including civil fraud penalties totaling $30,433. The Considines paid the deficiencies and sued for a refund.

The Government moved for summary judgment, contending that the prior conviction estopped Considine from contesting any elements of the civil fraud penalty or that the fraud exception to the statute of limitations applied. The trial court granted the motion and entered judgment for the Government.

I
COLLATERAL ESTOPPEL

To establish liability for the section 6653(b) 50 percent civil fraud penalty, the Government must establish: (1) a knowing falsehood; (2) an intent to evade taxes; and (3) an underpayment of tax.[1] *See Considine* v. *United States*, 645

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[1]Although the burden of proof is usually on the taxpayer in contesting a deficiency, the Government has the burden of proof to establish the elements of the civil fraud penalty by clear and convincing evidence. *See Lollis* v. *Commissioner*, 595 F. 2d 1189, 1192 (9th Cir. 1979); *Powell* v. *Granquist*, 252 F. 2d 56, 61 (9th Cir. 1958).

F. 2d 925, 929 (Ct. Cl. 1981). A prior conviction will estop a party from contesting in a later civil suit any element necessarily established in the criminal trial. *See Commissioner* v. *Sunnen*, 333 U.S. 591 (1948).

The district court relied upon *Considine* v. *Commissioner*, 68 T.C. 52 (1977) (*Considine I*) in holding that Considine was collaterally estopped from contesting the elements of the fraud penalty.[2] In that case the Tax Court held that conviction under section 7206(1) for filing a false return necessarily involves fraud against the Government. The Tax Court reasoned: (a) that it had previously held that a conviction for willfully attempting to avoid tax (I.R.C. § 7201) established fraudulent intent justifying a civil fraud penalty, *see Amos* v. *Commissioner*, 43 T.C. 50, *aff'd*, 360 F. 2d 358 (4th Cir. 1965); (b) that the Supreme Court had held that "willfully" has the same meaning in section 7206(1) (false return) as in section 7201 (attempt to evade tax), *see United States* v. *Bishop*, 412 U.S. 346 (1973); and (c) therefore that a conviction for filing a false return, without more, establishes fraud justifying the civil penalty. *Considine I*, 68 T.C. at 59-61. The Tax Court also held that the conviction necessarily established underpayment of tax because the indictment had charged that the return was false in that certain item of income were omitted. *Id.* at 61-66. The court agreed with the taxpayer, however, that the conviction did not establish the exact amount of the underpayment, because proof of the amount of underpayment was not required to convict under section 7206(1). *Id.*

We believe *Considine I* is incorrect. The Supreme Court acknowledged in *Bishop* that sections 7201 and 7206(1) each require "willful" perpetration of a different act [*sic*]. 412 U.S. at 360 n.8. The express language of section 7201

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[2]In *Considine I*, the taxpayer contested the civil fraud penalty assessed for 1969.

requires an intent to avoid tax (a legitimate synonym for fraud). Section 7206(1) (false return), however, does not require any fraudulent intent. See, *e.g.*. *United States* v. *DiVarco*, 484 F. 2d 670, 673 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974); *Schepps* v. *United States*, 395 F. 2d 749 (5th Cir.), *cert. denied*, 393 U.S. 925 (1968). Because section 7206(1) does not require a willful attempt to evade tax, a conviction under section 7206(1), without more, does not establish fraudulent intent. *See Goodwin* v. *Commissioner*, 73 T.C. 215, 235-39, 241-44 (1979) (Judges Featherston and Chabot, dissenting).

We agree with *Considine* v. *United States*, 645 F. 2d 925, 928-31 (Ct. Cl. 1981) (*Considine II*),[3] however, that the prior conviction does estop Considine from contesting that the return was willfully false and resulted in an underpayment of tax. Proof of falsity is a necessary element for the section 7206(1) conviction because the statute expressly requires it. Proof of omission of the interest income was necessary because that was the specific falsity the indictment charged.

Considine contends that even this limited collateral estoppel is inappropriate because the findings regarding falsity and omission of income were not "ultimate" findings in either the prior conviction or the present case. *See The Evergreens* v. *Nunan*, 141 F. 2d 927 (9th Cir.), *cert. denied*, 323 U.S. 720 (1944); *Yates* v. *United States*, 354 U.S. 298, 337-38 (1957). We do not agree. The only sense in which the findings from the prior conviction are not "ultimate" is that

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[3]In *Considine II*, Considine challenged in the Court of Claims the civil fraud penalty assessed for 1966 and 1967. The Government does not contend that the decisions in *Considine I* or *Considine II* regarding years 1966-67 and 1969 estop Considine from contesting in the present case the validity of the penalty for 1965. *But see generally Starker* v. *United States*, 602 F. 2d 1341, 1344-48 (9th Cir. 1979).

they are not the only findings required to resolve the current suit. We know of no authority suggesting that collateral estoppel may be applied only where it resolves all issues in the second suit. *See Considine II*, 645 F. 2d at 931 n.19; *The Evergreens*, 141 F. 2d at 928. *See generally, Pullman-Standard* v. *Swint*, U.S. , 50 U.S.L.W. 4425, 4428-30 (April 27, 1982).

Considine II also held that although Considine was not estopped from contesting fraudulent intent and the amount of underpayment, there was no material issue of fact as to these matters and summary judgment should be entered for the Government. *Considine II*, 645 F. 2d at 931-32. We conclude that there was also no material issue of fact on these issues in the present case.[4]

The Government contended in its summary judgment moving papers that Considine's return falsely omitted $57,131 interest income. Considine did not contest this figure. He controverts the Government's calculations only on the basis that the entire amount is not taxable income. This he may not do; the prior conviction established that he received a substantial amount of unreported interest income. Because Considine does not controvert the Government's calculation of the amount of this income, we must conclude there is no material issue of fact on this issue. There is also no dispute regarding the calculation of the penalty. Considine stipulated that if $57,181 were added to taxable income, the Commissioner's calculation of the amount of underpayment (from which the penalty is calculated would be correct).

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[4]Although this was not the basis on which summary judgment was entered by the district court, this court may affirm on any basis presented in the record. *See Shipley* v. *United States*, 608 F. 2d 770, 773-74 (1979).

We think it is equally clear that there is no material issue of fact whether the return was filed with intent to evade tax. The Government's moving papers asserted that Considine had studied law, had practiced as a tax accountant, and was well versed in tax law. Considine did not controvert this. The natural inference to be drawn from willful underpayment by such a sophisticated taxpayer is that it is done with intent to defraud the Government. Considine offered no evidence or argument suggesting that the false statements were made with any other intent.[5] Therefore, the trial court properly concluded that there was no factual dispute and that the Government was entitled to summary judgment on this issue.

II
STATUTE OF LIMITATIONS

There is no statute of limitations "in the case of a false or fraudulent return with intent to evade tax." I.R.C. § 6501(c)(1). Our conclusion that there was intent to evade tax for purposes of the civil fraud penalty also invokes this exception to the statute of limitations. *See Considine II*, 645 F. 2d at 932.

III
LIABILITY OF CONSIDINE'S WIFE

Thalia Considine argues that the district court erred in holding that she had established no basis for relief from the penalty because there was no evidence that she participated in the fraud. *See* I.R.C. § 6653(b). We do not agree.

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[5]As the court noted in *Considine II*, this is not the type of case where the taxpayer falsifies the source, but not the amount of, income to cover up the illegal nature of his operations. 645 F. 2d 932 n.20. Such a case might not give rise to the same inference that the false return was filed with the intent to avoid paying taxes.

Where there has been no showing that the wife is involved in the fraud, the entire penalty may be assessed against the husband, even if it will be paid out of community funds. *See Lollis* v. *Commissioner*, 595 F. 2d 1189, 1192 (9th Cir. 1979). Here there was no evidence that the Government collected the penalty from Thalia Considine; the Considines jointly paid the deficiency and sued for a refund. Thus, although Thalia Considine may have a theoretical right not to be assessed for fraud, there is no practical remedy because no refund is due.

AFFIRMED.

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No. 81-2300

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THALIA KELLY CONSIDINE

and

CHARLES RAY CONSIDINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

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CERTIFICATE OF SERVICE 7

REPLY BRIEF FOR PETITIONERS

It is common knowledge among experienced counsel in the federal courts that some judges do not follow Supreme Court decisions with which they disagree.* The instant Petition sets forth a good example of that practice. To the extent that certiorari is denied in such a case, a Supreme Court decision has been overturned by a lower federal court, and the offending judges have been encouraged to repeat the process. Moreover, the strain of defending such errant decisions usually forces a litigant to offer new and strange arguments in an attempt to rationalize

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* A variety of techniques too numerous to list are used to camouflage this refusal. One example is to make distinctions where none are intellectually possible. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 48, n. 14 (1977). Another is to pay lip service to the rule itself while resting an avoidance of its application on an erroneous reading of a subsidiary rule, the instant case.

them or to remain silent on the point raised by the Petition. The United States has chosen the latter course here, as is shown hereinafter.

The Petition argues that:

1. The prior criminal perjury judgment "need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue" in the present proceeding, and "so far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative." Yates v. United States, 354 U.S. 298, 338 (1957). The opinion, citing from The Evergreens v. Nunan, 141 F.2d 927, 931 (2nd Cir. 1944), held that "we do not hesitate to hold that, even assuming arguendo that 'mediate data', decided in the first suit, conclusively established facts 'ultimate' in the second, no fact decided in the

first, whether 'ultimate' or a 'mediate datum', conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit." That is, unless the findings of fact that Charles Considine had additional interest income of $9,975 and overstated a charitable contribution by $8,876.24 are ultimate facts in the present section 6501(c)(1) proceeding, the Petitioner is not barred by collateral estoppel from proving that there was no such additional interest income or overstated deduction. Thus, the United States is wrong when it states, at page 5 of its Memorandum, that Yates and Evergreens "hold that the doctrine of collateral estoppel makes conclusive in subsequent proceedings determinations of fact and mixed fact and law questions that were essential to the prior decision." Those cases hold no such thing at all.

What they hold is that it is only those determinations of fact from the prior proceeding which are ultimate facts in the later proceeding that are barred from litigation in the subsequent proceeding.

2. In the present section 6501(c)(1) proceeding (opening the statute of limitations to permit an assessment herein), the ultimate issue of fact is not whether the Petitioner had additional income from interest and overstated a charitable deduction, but is whether the return filed was false or fraudulent with the intent to evade tax. See Amos v. Commissioner, 43 T.C. 50, 55-56, n. 6 (1964), interpreting section 6653(b) which has the same ultimate issue of fact. "The willful filing of an income tax return omitting income (or overstating a charitable deduction) is a fact which if true may, together with

further facts, be a basis from which an intent to evade tax may be inferred," but "it is not an ultimate fact in a section 6653(b) proceeding" (whether an underpayment of tax is due to intent to evade tax). Goodwin v. Commissioner, 73 T.C. 215, 246-247 (1979).

Therefore, unless the Court of Claims was correct in its contrary ruling that the understatement of income and overstatement of a deduction were ultimate facts in this section 6501(c)(1) proceeding, its opinion clearly violates Yates. In contrast to Petitioners' argument and citation to Amos and Goodwin, the United States is silent on this point.

CONCLUSION

In the first criminal perjury proceeding, Petitioners were prohibited from defending the section 7206(1) charge on the ground that there was no intent to

evade tax. Now the Court of Claims has ruled that, under the doctrine of collateral estoppel, the facts established in the first proceeding may not be relitigated here in this second proceeding and are sufficient to permit the Court to infer intent to evade tax. Yates does not permit such a denial of due process.

Respectfully submitted,

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September 3, 1982

CERTIFICATE OF SERVICE

I, W. Lee McLane, Jr., attorney for Petitioners and a member of the Bar of this Court, certify that this Brief was served upon Respondent's counsel of record by depositing three copies in the United States mail on September 3, 1982, first-class postage prepaid, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served were served.

W. Lee McLane, Jr.